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John Brydall

JUS PRIMOGENITI,

OR, THE

Dignity, Right, and Priviledge

OF THE

FIRST-BORN.

Inquisited and Defended against the Impious Practice of some Fathers, in Disinheriting their First-Begotten Sons.

In a LETTER *to a Friend in the Country.*

By *B. J.* Esq;

Most Worthy SIR,

I Have Received and Read your Letter, wherein you are pleased to tell me, that there is a Person (a Neighbour of yours) of good Quality, and of a very plentiful Estate in Lands, who is a Bigamist, or one that has had two Wives: By the former Wife he had a Son, now Living; and by the latter, another Son: And that he has been so profuse in his Love towards this last Wife and her Son, that he has settled all his Estate of Inheritance, after his own Decease, on this Younger Son, to the absolute Exclusion and Exhæredation of his

Grotius *tells us, that if a Person Disinherited, did not by his Crime deserve to be put to Death, he was to be allowed sufficient to sustain Nature. Lib. 2. 1. 7. Sect. 7.*

First Begotten Son, that has been in his Life and Conversation no way guilty of any Filthy and Dishonest Acts, as to forfeit his Birth-Right and Inheritance; yea, he has not only, you say, deprived the Eldest Son of the Inheritance, but also denies to allow him any present Sustenance, to preserve that Life, which his Father hath given him; which kind of Behaviour in a Father you look upon as Prodigious and Unnatural; and so indeed do I, as well in respect of the Abdication or Exhæredation, as of the Father's Denial of allowing the Son a present Subsistance.

Parentes nos alendo, nepotum nutriendorum debito alligarunt.

As for Aliment or Sustenence, you must know, all Divines, Lawyers and Casuists do hold, that Parents do owe it to their Children by the Law of Nature, and do pronounce it to be a Debt, though not strictly taken, for that which by Commutative Justice we are obliged to do; yet largely, and in a looser Sense, for that which cannot with Honour and Honesty be left undone; in which looser Sense, it is conceived, that of *Val. Maximus* is to be understood, *Our Parents, by Nourishing us, have laid this Obligation upon us to Nourish our Children.* And that also of *Plutarch*, in his Elegant Oration concerning the Love of Parents towards their Children, *Our Children look for our Estates as due unto them after our Death:* So great was the Equity of this, *That St.* Augustine *would not admit that the Goods of such as had Exhæredated their own Children, should be received by the Church.* And as *Procopius* in his *Persian* Wars observes, *Though Humane Laws do in other things extremely differ one from another, yet all Nations, as well* Romans *as* Barbarians *in this agree, That Children should succeed to their Parents, as the right Owners of what they leave.*

Liberi hæreditatem ut Sibi debitam exspectant. Lib. 2. de vita Cler. & Ser. 52. adfrat. in Eremo.

Qui, dat formam, dat quæ ad formam sunt necessaria. Aristotle.

But farther yet Sir, It is an Established Maxime among Philosophers, *He that gives the Form, gives things necessary to that Form.* Therefore he that gives Man his Existence, ought as much as in him lies, to provide for him all things necessary for a Natural and Sociable Life, for hereunto he was Born. There needs no Law to bind us to this Duty; for all other Creatures, even by Natures Instinct, do feed their Young: Hence it is, that the Ancient Civilians do refer the Education of Children to the Law of Nature. And *Euripides* comprehends all Creatures under one and the same Law; *Which*, saith he, *is common as well to Men among themselves, as to them, with all other Sensible Creatures.* For that which Natural Instinct commends to them, the same doth Reason unto us. *Of such force is Natural Affection, that it easily perswades us to Nourish our Children*, saith the Emperor *Justinian.* *These two Things*, saith Cicero, *cannot agree together, to wit, that Nature would have Procreation, and it would not have the Creature, when it is Born, to be Beloved and Conserved, the which appeareth*, quoth he,

Instit. 1. 2. in princ. D. 1. 1. 3. Bracton. L. 1. c. 5. num. 7.

Ipse Naturalis Stimulus parentes ad Liberorum Educationem hortatur. c. 5. 13. Sileat.

evidently

evidently in Brute Beasts, whose Labour and Care in the Conservation of that which is Born of them, is such, that we may acknowledge the force and voice of Nature therein. Wherefore it is manifest, saith he, *that as we Naturally shun and abhor all kind of Grief; so also we are Naturally moved to Love the Issue of our Bodies.* The same *Cicero* otherwhere expresses himself thus; *Whereas it is common to all Living Creatures to have a Care of those things which they have brought forth, Nature has given especially to Man a Love to his Children, and a Care to provide them things necessary.* To be short, *Salust* Condemns that Testament as Impious and Unnatural, by which the Son is excluded from his part of the Inheritance. And because this is a Debt that we owe to Nature, therefore the Mother is bound to Nourish the Child that hath no certain Father. These forementioned Authorities being sufficient to prove, *That Parents owe a part of their Goods to their Children, by the Law of Nature:* I shall here subjoin what Foreign Legislators have enacted for the enforcing the Piety of Fathers towards their Children; and I will begin with those Texts that I have met withal in *Justinians Digests, Code* and *Authenticks.*

Cicero Lib. 3. de Finibus.

Cicero Offic. Lib. 1.

D. 25. 35. 4.

In the *Digests*, there is a Purveyance made, whereby both the Father is compelled to acknowledge his Child, (if there be any Variance between the Husband and the Wife, upon any Jealousy or Suspicion of Adultery, if the same cannot be proved by the Womans own Confession, by Witnesses, by the Act it self, or some other violent Presumption) and to Nourish and Maintain the same; but if the Fault appear against her, and it be so Sentenced by the Judge; then may he as well refuse the one as the other; but for other Children, upon whom there is no such doubt, the Parents may be constrained to Maintain, Cloath and Feed them, and to set them out a Portion of their Goods, so that either the State and Faculty of the Parents will bear it, or the Children have not deserved to the contrary, wherefore they should not in that sort be provided for.

D. 25. 3. de Agnoscendis, & alendis Liber. &c C. 5. 25. de Alendis Liberis, ac parentibus. D. 25. 4. de inspiciendo ventre custodiendo ne partu. Ridley's *View of the Civil and Ecclesiastical Law. Part 4. cap. 2. sect. 1 pag. 376. edit. 1675.*

In the Code of *Justinian*, there is an Ancient Law extant, made by *Gratianus, Valentin* and *Theodosius*, to this purpose, 'That neither the 'Woman Surviving her Husband, neither the Man Surviving his Wife, 'having Issue between them, during the Matrimony, have the pro-'perty of those Goods, which either of them brought one to the other, 'and are left behind by the Defunct; but the property is the Childrens 'of the Deceased, and the Use or Benefit his or hers only, which doth 'Survive, during his or her Natural Life; and for the return thereof 'to the Children that are the right Owners, the Civil-Law is so scru-'pulous, that if the Husband or Wife do Marry, it will have him that 'is to Marry the Widow, bound with good Sureties for due Restituti-

L. 3. c. de secundis nuptiis.

on of the Defuncts part, unto the Children of the former Marriage.

In the *Authentick*s there are ſeveral Conſtitutions made for the preſervation of Childrens Properties, and Portions, whereof take theſe following Examples.

Novella Conſtit. 2. de non eligendo ſecundo nubentes mulieres; & alienatione, & lucro ante Nuptialis donationis; & de ſucceſſionibus earum filiis ſuis.

That it ſhall not be lawful for a Widow, coming to a Second Marriage, after her firſt Husband is Dead, to Sequeſter one of her Children from the reſt; upon whom ſhe will beſtow ſuch things as her firſt Husband gave her before Marriage, but that the Benefit thereof ſhall be common to them all: Neither that ſhe convey it over to her Second Husband, or his Children, and ſo defraud her firſt Husbands Children. And that a Man in like ſort Surviving his Wife, ſhall do the like towards his firſt Wifes Children; as concerning ſuch Dowry as the firſt Wife brought to her Husband.

Novella conſtit. 92. de immenſis donationibus in filios factis.

If Parents give profuſely to one of their Children, the other notwithſtanding ſhall have their lawful Portions, unleſs they be proved unkind towards their Parents.

Novella Conſtitutio 98.

A man ſhall not have the property of his Wifes Dowry, neither the Woman the property of that which is given her before Marriage; but the property of either of them ſhall come unto their Children, yea, though they Marry not again. From the Civil Law of the *Romans* let us come to other Foreign Laws and Cuſtoms.

Grotius de jure belli & pacis lib. 2. c. 7. Sect. 8.

It was a Law among the *Mexicans*, to give all the Antient Inheritance to the Eldeſt Son, and nothing to the reſt, but Suſtenance only; And no much better are ſecond Marriages in *Brabant*, where the Children by the ſecond Venter, have no propriety in the Eſtate which the Father held at the Death of his former Wife. The like Law we find among the Antient *Burgundians*.

Hammond in his Annotation on Gal. 4. v. 30.

There is (ſaith a Learned Divine, *Doctor Hammond*, I mean) a Cuſtom of *Matrimonium Morgengabicum* in ſome Countries, as *Denmark*, &c. at this day, where the ſecond Wife and her Children that come from her, are not taken into a right of the Husbands Eſtate; ſhe to have any part of it for her Iointure, or they for their *Inheritance*, but only ſome Gifts or Portions, Aſſigned them by Compact; which are called *Morgengab*, or *Marriage-Gift*; with which they are to content themſelves, without any part of the *Inheritance*. Hitherto of the Impiety and Unnaturalneſs of ſuch Parents as ſhall deny their Children Aliment; as alſo of the Proviſion Foreign Laws have made for the Maintaining, Clothing, and Feeding Children, during the Lives of their Parents; and for preſerving after their Deaths the property of either of them, for the benefit of their Children: I come now (Sir) to vindicate the Dignity, Right, and Priviledge of *Primogeniture*, againſt that Impious and Unnatural Practice of Diſinheriting

First-born

First-born Sons; and that the practice of your Neighbour, can be no other than such, appears in this, that he has not Exhæredated his Son by the former Venter, upon the account of any horrid Crime the Son has committed, but only to serve his own Fooliſh Fantacies, private Paſſions, and indirect Fondneſs: And therefore let him hear what *Philo* and others ſay to the point of Exhæredation; *(a) Fathers* (ſaith he) *do ſometimes paſs Sentence of Exhæredation on their own Sons, thereby cutting them off from their own Families and Kindred, but never until they grow Shameleſs and Incorrigibly Wicked, and that their Hatred of their Childrens Vices have quite overcome that great and unparallel'd Love which Nature had at firſt imprinted in them.* Not much different is that of *Phinehas* in *Diodorus*, *no Father doth willingly Puniſh his Sons, unleſs the meaſure of their Wickedneſs do very much exceed the meaſure of his Natural Affection:* Nor that of Andronicus Rhodius, *no Father can be ſo unnatural as to caſt off his Son, if he be not extreamly Wicked.* I cannot here paſs over in Silence, the Famous and Heroical Behaviour of two Heathen Fathers towards their Wicked Sons; but propound it to all Chriſtian Parents, as a Pattern for their Imitation.

(a) *Patres Abdicationis triſtia verba pronuntiant, filioſq; a domo ſua et omni cognatione abrumpunt ita demum, ubi amorem illum, quem ingentem ac ſuper omnia eximium natura parentibus indidit, foliorum improbitas vicit.* *lib.* 5. *v.* 9.

Valerius Maximus, ſaith thus of *Quintus Hortenſius*; *His Honour he bequeathed to his Blood*, for though he deteſted the Wicked Life of his Son, yet Dying, *To preſerve the Order of Nature, he made his Son, and not his Nephews, Heir to his Eſtate*; thinking it enough, that he had declared his diſlike of his Sons Ill Manners whilſt he Lived: And therefore Dying, he left him the Honor due to his Blood. The like he records of *Fulvius*, who cauſing his own Son to be Apprehended for Conſpiring his Death; did not only forbear to Proſecute him whilſt he Lived, but Dying, *made him Heir of all he had, regarding his Birth and Blood, and not his Crimes.* Beſides what has been by me Cited, in favour of the Firſt Born; from the Pious Practice of meer Heathen Parents towards their Wicked Sons; I ſhall endeavour for the Confutation of all Exhæredators, to demonſtrate unto you, that the Preference and Prerogative of *Primogeniture* in point of Dignity, Right, and Poſſeſſions, which the Firſt-born Son Claims to himſelf, is derived from the Law of Nature, Inſtituted by God, and highly approved, very much Regarded and Countenanced by our moſt Eminent Divines.

Sanguini honorem reliquit. Ne ordinem Naturæ confunderet non nepotes, ſed filium hæredem ſcripſit.

Dominum omnium eſſe voluit, quem genuerat hæredem inſtituens, non quem fuerat expertus.

I. *The Right, and Priviledge of* Primogeniture, *is derived from the Law of Nature*

That this Precedency, both in Honor and Right appertains to the Firſt-born by the Law of Nature, appears in this, That *Primogeniture* is not only preferred where Gods Revelation of himſelf in the Scriptures

Scriptures are received, but where they are not received; the Right therefore of *Primogeniture* is from the Law of Nature: Again, If *Primogeniture* had not been a Sacred Thing, and Inheritance annexed to it by the Law of Nature, then could not *Esau* have been pronounced a Prophane Person for Selling his Birth-right, *Heb.* 12. 16. Altho' he did it to save his Life, *Gen.* 25 34. But being done by the Law of Nature, I say, *Esau* by his Sale could not transfer it to *Jacob*; yet, because *Esau* did despise it, *Gen.* 25. 34. it was just with God to transfer it to *Jacob*; neither can it be shewed any where in Sacred Writ, but that always *Primogeniture* in Descents, was a good Title, where God did not interpose; which is consonant to that which *Nicholas Conjates* utters: (a) *Nature indeed observing her own Order, gives the greatest Honour to the First-born; but God* (says he) *hath a Prerogative above Nature, and acts not always by her Order:* And therefore, though *Primogeniture* be preferred by the Law of Nature, and (b) immutable by the Will of Man; yet is not God, as 'tis said before, subject thereunto; but before the Flood he rejected *Cain*, though the *First-born* of *Adam*, and made him a Vagabond, and none of the *Patriarchs*. So in the First Age, after the Flood, God subjected *Canaan*, altho' the Son of *Ham*, *Japhets* Eldest Brother, to *Japhet:* And so did God prefer *Jacob* before *Esau*, and *Ephraim* before *Manasses*, and *Solomon* before *Adonijah:* Yet where and when God did not reveal himself to Man otherwise, was ever *Primogeniture* preferred.

(a) *Natura quidem suum sequens ordinem primum natos honorat, at deus non semper in maximis privilegiis eum ordinem insistit.*

(b) D. 4. 5. 8. D. 50. 17. 8. D. 38. 7. 6. *Inst.* 1. 15. 3. & 3. 1. 11.

Let there be an Inquiry made, whither your Neighbour has had any divine Revelation for what he has done.

II. *The Preference, and the Prerogative of Primogeniture, in point of Dignity, Possessions and Consecration, is of Divine Institution.*

This is manifestly evidenced by several places of the Holy Scriptures.

I. *In respect of Dignity and Power*, as where God said to *Cain* of his Younger Brother *Abel*, *His desires shall be subject to thee, and thou shalt have Dominion over him*, Gen. 4. 7. So when Old *Jacob* called his Sons to Bless them, he expresseth himself in this wise to his Eldest Son *Reuben*; *Reuben*, saith he, *Thou art my First born, my Might, and the beginning of my Strength, the Excellency of Dignity, and the Excellency of Power*, Gen. 49. 31. Which kind of Excellency is acknowledged by the Good King *Jehoshaphat*, to be annexed to Priority in Birth; *For he gave to his Younger Sons great Gifts of Silver and Gold, with Fenced Cities in* Judah; *but the Kingdom gave he to* Jehoram, *because he was the First-born*, 2 Chron. 21. 3.

2. *In*

2. *In respect of Possessions*, As, where God forbiddeth the Father to Disinherit the First-Born of his double Portion, because by Right of Birth it is Due unto him, *Deut.* 21. 17.

3. *In Respect of Divine Consecration*, As, where God maketh Choice of the First-Born to be Sanctified and Consecrated to himself. *Exod.* 13. 2. and 22. 29. and 34. 19. *Levit.* 27. 26. *Numb.* 3. 13. and 8. 16. and 18. 15. *Neh.* 10. 36. *Luke* 2. 23. Sir, Any Reasonable Man would think that such Respects or Considerations as these should be enough to deter a Father from Depriving his Eldest Son of his Prerogative of Birth, and from preferring his Younger Son, which he has by another Wife, in Succession before him.

III. *Priviledges of Primogeniture are highly Approved, and very much Countenanced, by the Divines of our Church.*

What Respect and Care the Eminent Divines of our Church have had for the Preservation of the Order of Nature, and of Divine Institution, in the Right of Primogeniture, as to the Dignity and double Portion of the First-Born; shall be Apparanted (amongst many others) by a Triumvirate of Witnesses, to wit, *Usher*, *Taylor*, and *King*.

1. What special Regard is to be had by Parents to the Eldest Son, hear what Dr. *Usher*, Arch-Bishop of *Armagh* utters, 'Since God (*saith he*) hath Honoured him with that Dignity, as to be their Strength, 'he should be also Honoured by them, (at the least) with a double 'Portion, as by the rest of the Brethren with Honour, yet so as he 'fall not from his Honour by some Horrible Sin. *Body of Divinity*, or, *The Sum and Substance of the Christian Religion*, *Page* 262. *Edit.* 1648.

2. Dr. *Taylor*, Late Bishop of *Down* and *Connor*, touching *The Sickmans Practice of Charity and Justice*, speaks in this wise, 'Let him 'make his Will with great Justice, and Piety, *that is*, that the Right 'Heirs be not defrauded, for Collateral Respects, Fancies, or Indirect Fondness, but the Inheritance Descend in their Legal and Due 'Channel, *Holy Dying*, *Chap.* 4. *Sect.* 9. *Pag.* 231. *Edit.* 1660.

3. My Third and Last Witness in Favour of the *First-Born*, is Dr. *King*, Late Bishop of *Chichester*, who expresseth himself in these very words following.

'There be (saith he) but *Two Great Rights*, which you find in 'Scripture. 1. *Jus Primogenituræ*, *The Right of Primogeniture*. 2. *Jus* 'Regni, *The Right to a Kingdom*. In the *First* of these all Domination 'was Originally Founded; For the Elder Brother in his Tribe, was 'Princips Familiæ, *The Prince of his Family*. And not only the Ex-

'cellence

'cellence of Dignity which was his Birth-Right, but the Inheritance 'is so fastned to him, as if God intended no separation either by the 'Hatred, or Affection of the Parent. The Text is most Remarkable, (and I wish all Parents would lay it to heart,) *If a Man have two Wives,* Deut. 21. 15. *one beloved, and another hated, and they have Born him Children, both the beloved and the hated; and if the First-Born Son be hers that was hated:* ver. 16. *Then it shall be, when he maketh his Sons to Inherit that which he hath, that he may not make the Son of the beloved First-Born, before the Son of the* ver. 17. *hated, which is indeed the First Born: But he shall acknowledge the Son of the hated for the First-Born, by giving him a double Portion of all that he hath: For he is the beginning of his Strength, the Right of the First-Born is his.*

'Therefore, Tho' the Law hath been over Curious to un-rivet this 'Birth-Right, by God's and Man's Law Entailed upon the Elder, 'by bringing in Feigned Persons, and false Vouchers, and Formal Pro-'clamations to divest it. I must only say thus much, *Sic non fuit ab* '*Initio*, (as Christ said of Divorce) *It was not so from the Beginning*; 'but out of the hardness of Mens Hearts did this Invention spring. 'How ill an Inheritance Wrested from the *Right Heir*, to be placed 'upon another, hath Prospered, let the Example of so many Unhappy 'Families Ruined upon this Account Testify, *Sermon on Ezech.* 21. 27. *Page* 19. 20. *Preached at* White-Hall, *on the* 29 *of* May. 1661.

Thus, Dear Sir, having offered to your View, my Sentiments of your Neighbors unnatural Deportment, and Carriage towards his First-Born Son, as well in point of his Abnegation of present Sustenance, as of his Exheredation, I Humbly take my Leave of you, with this Assurance attending on it; that I am never more pleased, than when I have the opportunity of Subscribing my self,

Your most Affectionate Friend,

and very Humble Servant.

LONDON: Printed for *R. Battersby*, at *Staple-Inn* next the Bars, in *Holborne*. 1699. Price 2 *d.*

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